Chan King Yu v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–17 OF 2002
GOPAL SRI RAM, RICHARD MALANJUM AND NIK HASHIM JJCA
4 JULY 2006

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(da) — Trafficking — Judge invoked presumptions under s 37(da) of the Dangerous Drugs Act 1952 — Sharp conflict of oral evidence — Whether appellant had mens rea possession — Dangerous Drugs Act 1952 s 37(da)

The appellant was convicted by the High Court at Kuala Lumpur on a charge of trafficking 9,103.9g of methamphetamine and was sentenced to death. The facts of the case is that the appellant arrived from Hong Kong on 12 June 2000. When arrested on 19 June 2000 a very large quantity of methamphetamine was found in the hotel room of which he was the sole occupant. He was seen bringing into his room the three plastic bags which had the cylinders containing the drug in question. He disposed the plastic bag into a garbage can although he denies this. There was a plastic packet on the bedside table containing the proscribed drug in question. The gist of the appellant's defence which he made on oath is that he had been sent by his employer in Hong Kong, one Michael Chan to collect money from the latter's client. On the appellant's arrival at the airport at Kuala Lumpur he was met by one Man Chai, one of Michael Chan's clients. He was told by Man Chai to collect some tools which the appellant did. He denied placing the plastic bags inside the POLO suitcase. He claimed that the policemen had done that. He denied any knowledge of the drugs in the cylinders. He denied that the small packet of drugs found on the bed side table was his. No challenge was taken as to the findings of the learned trial judge on the nature of the drug after chemical analysis and its weight. The only argument advanced in the appeal was that the appellant had no mens rea possession and was therefore not guilty of the offence.

Held, dismissing the appeal:

(1) Whether the prosecution has established mens rea possession in a given case is a question of fact depending on the facts and circumstances of each case. Proof of knowledge in a criminal case is, short of a voluntary confession by an accused, like many other states of a guilty mind in a criminal case, a fact to be gathered inferentially from proved facts and surrounding circumstances. In particular the acts done by an accused and other circumstances provide valuable assistance to a court in determining whether that accused had the requisite mens rea. It is in reality a common sense approach (see para 8).

(2) Taking into account the combined strength of the individual strand of evidence in this case, there can be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of drug he possessed and that he had the power of disposal over it. The overt acts of the appellant certainly establish these matters. In short, the appellant had mens rea possession. The learned judge was therefore entirely correct in invoking and applying the presumption under s 37(da) of the Act and in holding that the appellant had committed the offence of trafficking (see para 10).

(3) The learned judge also faced with a sharp conflict of oral evidence. He made findings of pure fact based on the evidence he accepted as true. It is also obvious from a reading of his judgment as a whole that he rejected the appellant's story that Man Chai was the real culprit. In such a case as this the appellate court must defer to the views of the trial judge who had seen and heard the witnesses (see para 11); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 followed.

[Bahasa Malaysia summary

Perayu telah disabitkan oleh Mahkamah Tinggi di Kuala Lumpur di atas pertuduhan mengedar 9,103.9g methamphetamine dan telah dijatuhkan hukuman mati. Fakta kes ini ialah perayu telah tiba dari Hong Kong pada 12 Jun 2000. Apabila ditangkap pada 19 Jun 2000 kuantiti methamphetamine yang banyak telah dijumpai di bilik hotel di mana perayu merupakan orang yang tunggal di bilik tersebut. Beliau telah dilihat memasuki biliknya dengan tiga beg plastik dengan silinder yang mengandungi dadah tersebut. Beliau telah membuangkan beg plastik tersebut ke dalam tong sampah. Walaupun ia menafikannya. Terdapat juga bungkus plastik di meja sisi katil yang mengandungi dadah yang diharamkan tersebut. Inti pembelaan perayu yang dibuatnya di bawah sumpah ialah beliau telah dihantar oleh majikannya di Hong Kong, satu Michael Chan untuk mengutip wang daripada klien majikannya. Setibanya perayu di lapangan terbang Kuala Lumpur, beliau ditemui oleh satu Man Chai, salah satu klien Michael Chan. Beliau diberitahu Man Chai untuk mengutip beberapa peralatan yang perayu lakukan. Perayu menafikan meletak beg-beg plastik di dalam beg pakaian POLO. Beliau menyatakan bahawa polis yang telah melakukannya. Perayu juga menafikan beliau mempunyai pengetahuan akan dadah di dalam silinder tersebut. Beliau juga menafikan bungkusan kecil di mana dadah telah dijumpai di meja sisi katil kepunyaannya. Tiada cabaran terhadap penemuan hakim perbicaraan yang bijaksana terhadap sifat dadah tersebut setelah dijalankan analisis kimia dan beratnya. Hujahan yang hanya dikemukakan di dalam rayuan ini ialah bahawa perayu tidak mempunyai mens rea pemilikan dan dengan itu tidak bersalah.

Diputuskan, menolak rayuan tersebut:

(1) Sama ada pendakwa raya telah menunjukkan mens rea pemilikan di sesuatu kes adalah satu soalan fakta berdasarkan fakta-fakta dan keadaan-keadaan sesuatu kes. Bukti pengetahuan di dalam kes jenayah, selain daripada satu pengakuan secara sukarela oleh tertuduh, seperti yang lain, menunjukkan

keadaan salah mindanya di dalam kes jenayah, satu fakta yang dikumpulkan secara inferens daripada fakta-fakta yang telah dibuktikan dan keadaan-keadaan sekeliling. Yang utamanya ialah perbuatan-perbuatan yang dilakukan oleh tertuduh dan lain-lain keadaan dapat membantu mahkamah dalam menentukan sama ada tertuduh mempunyai mens rea yang diperlukan tersebut. Dalam realiti ia adalah satu pendekatan pendapat akal budi (lihat perenggan 8).

(2) Dengan mengambil kira gabungan keteguhan setiap lembar sisal keterangan di dalam kes ini, sama sekali tidak diragui bahawa perayu sedar beliau memiliki dadah dan bahawa beliau mengetahui sifat dadah yang dimilikinya itu dan beliau mempunyai kuasa untuk mengendalikan dadah tersebut. Tindakan perayu yang terang-terangan telah mewujudkan perkara-perkara di atas. Pendek kata perayu mempunyai milikan mens rea. Hakim bijaksana dengan itu telah betul dalam menggunakan anggapan di bawah s 37(da) Akta tersebut dalam memutuskan bahawa perayu telah melakukan kesalahan pengedaran (lihat perenggan 10).

(3) Hakim yang bijaksana juga telah berdepan dengan keterangan lisan di mana terdapat konflik. Beliau telah membuat penemuannya berdasarkan fakta semata-mata berdasarkan keterangan yang diterimanya sebagai benar. Ia adalah jelas apabila membaca penghakimannya bahawa secara keseluruhan beliau telah menolak cerita perayu bahawa Man Chai merupakan pihak yang bersalah. Dalam kes sebegini mahkamah rayuan mestilah menurut pandangan yang dinyatakan oleh hakim perbicaraan yang telah melihat dan mendengar saksi-saksi (lihat perenggan 11); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 diikut.]

Notes

For cases on s 37(da) of the Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 192–201.

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644 (folld)

Chan Chwen Kong v PP [1962] MLJ 307 (refd)

Saad bin Ibrahim v PP [1968] 1 MLJ 158 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)

Appeal from: Criminal Trial No 45–16 of 2001 (High Court, Kuala Lumpur)

Gurbachan Singh (Bachan & Kartar) for the appellant.

Awang Armadajaya bin Awang Mahmud (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The appellant was convicted by the High Court at Kuala Lumpur on a charge of trafficking 9,103.9g of methamphetamine and was sentenced to death. He appealed to us against his conviction and sentence. We dismissed his appeal. The reasons for our decision are now produced. First the facts.

[2] On the morning of 19 June 2000, ASP Giam Kar Hoon (PW7) from the Narcotics Division of Bukit Aman received information that a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug at a hotel in Kuala Lumpur on that very day. Acting on that information PW7 assembled a team of police personnel. Among the team were Shamsuddin Jantan (PW4) and Lance Corporal Abdul Halim Basri (PW5). At about noon on the same day, PW7 received further information that the hotel at which the offence was to be committed was the Hotel Nova at Bukit Bintang. He at once despatched PW4 and one Detective Corporal Teoh to the hotel to conduct a surveillance of the appellant. On arrival at the scene, PW4 remained in his car which he parked close to the entrance of the hotel. At about 12.25 pm he saw the appellant emerging from the hotel. The appellant was alone. He carried a sling bag. PW4 recognised the appellant from a photograph given him by PW7. The appellant walked into Bukit Bintang Plaza, a well known shopping complex in Kuala Lumpur. When the accused emerged from the Plaza, he was seen carrying a new suitcase (exh P12) which bore the brand name 'POLO'. The appellant then returned to the hotel. He went into Room 1303 on the 13th floor. Then, at about 5.50pm, the appellant once again emerged from the hotel. He was alone. He walked onto the street and disappeared in the crowd. He returned to the hotel at about 7.20pm. He came in a taxi. After he had descended from the taxicab, the appellant removed three plastic bags from the trunk of the vehicle. Having paid off the taxi, the appellant re-entered the hotel. He carried the plastic bags with him. He took the lift to the 13th floor. The appellant re-emerged about 5 or 10 minutes later. He carried a plastic bag (exh P24) which he placed in a dustbin near the hotel. He then walked away. Exhibit P24 was recovered almost at once by PW4. It bore the words 'TANG'S SALE OF THE YEAR'. Inside it was a metal lid, tin foil, a card bearing the words "SANTA BARBARA POLO & RACQUET CLUB" and another card with the word 'TONGWU' printed on it. At about 7.20pm, a police ambush party arrived at the hotel and took their positions on the staircase landing on the 13th floor.

[3] The appellant returned to the hotel at about 8.50pm and went into Room 1303. A little later, PW7 meanwhile on the 13th floor, after being alerted of the appellant's arrival, PW7 and the ambush party waited for the appellant. After awhile, PW7 and his team having failed to gain entry into the room even with the assistance of the hotel's staff knocked on the door and introduced himself as a police officer. The appellant then opened the door. The room and bathroom were searched. Several items were recovered. On a table beside the bed was small packet of transparent plastic containing what proved on subsequent chemical examination to be methamphetamine. The sling bag which the appellant had carried with him earlier that day was found to contain the appellant's personal belongings as well as his travel

documents and air tickets. Also seized was exh P12. Inside P12 were three plastic bags. Each of these plastic bags contained a cylinder wrapped in tin foil. Each cylinder had within it 4 small parcels wrapped in carbon paper and sponges. All the parcels that were recovered contained a white crystalline substance which subsequent chemical analysis showed to be methamphetamine, a drug proscribed by the Dangerous Drugs Act 1952 ('the Act'). The appellant was arrested and later charged. Based on the foregoing facts the learned judge ruled that a prima facie case of actual possession had been established under s 37(da) of the Act. He then called upon the appellant to make his defence.

[4] The gist of the appellant's defence which he made on oath is that he had been sent by his employer in Hong Kong, one Michael Chan to collect money from the latter's client. On the appellant's arrival at the airport at Kuala Lumpur, he was met by one Man Chai, one of Michael Chan's clients. He was told by Man Chai to collect some tools which the appellant did. He denied placing the plastic bags inside the POLO suitcase. He claimed that the policemen had done that. He denied any knowledge of the drugs in the cylinders. He denied that the small packet of drugs found on the bed side table was his. He also denied that he threw exh P24 into the dustbin. He said that the plastic bags and their contents belonged to Man Chai who was supposed to come to the hotel and collect it.

[5] At the conclusion of the whole case, the learned judge held that the appellant had failed to raise a reasonable doubt as to the truth of the prosecution's case. He accordingly convicted the appellant.

[6] Before us, no challenge was taken as to the findings of the learned trial judge on the nature of the drug after chemical analysis and its weight. The only argument advanced in the appeal was that the appellant had no mens rea possession and was therefore not guilty of the offence. This submission requires a consideration of the evidence. But, before we address our minds to the evidence, we must hearken to the law, in particular, what the prosecution has to prove to establish its case. Essentially it must, for present purposes, prove that the appellant had, what is termed, '*mens rea* possession'. It is only then can it prove that the appellant was 'found in possession' within s 37(da) of the Act.

[7] '*Mens rea* possession' was explained by Yong J in *Saad bin Ibrahim v Public Prosecutor* [1968] 1 MLJ 158 in a passage that has been repeatedly applied with approval (at p 159):

> In my opinion mere possession is one thing and possession with *mens rea* is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case.

[8] Whether the prosecution has established *mens rea* possession in a given case is a question of fact depending on the facts and circumstances of each case. Proof of

knowledge in a criminal case is, short of a voluntary confession by an accused, like many other states of a guilty mind in a criminal case, a fact to be gathered inferentially from proved facts and surrounding circumstances. In particular, the acts done by an accused and other circumstances provide valuable assistance to a court in determining whether that accused had the requisite *mens rea*. It is in reality a common sense approach.

[9] Now, what is the evidence in this case from which *mens rea* possession may be inferred? First, there is the evidence that he arrived from Hong Kong on 12 June 2000. And his ticket shows that he was scheduled to return there on 22 June 2000. Second, when arrested on 19 June 2000 a very large quantity of methamphetamine is found in the hotel room of which he was the sole occupant. Third, he was seen bringing into his room the three plastic bags which had the cylinders containing the drug in question. Fourth, he disposed of the plastic bag (exh P24) into a garbage can. He denies this. But what possible motive could there be for PW4 to make up this part of his evidence? He was a policeman assigned to keep watch over the appellant's movements at and about the hotel. He did just that. And he told the court what he saw. So the judge was quite correct in accepting PW4 as a truthful witness and in acting upon his evidence. The appellant's overt act of disposing of exh P24 shows that he was exercising dominion over the contents of that bag, all of which came from his room. Fifth, there is the plastic packet on the bedside table containing the proscribed drug in question. Sixth, there is the act of the appellant purchasing the large POLO suitcase when he already had one in his room. Seventh, there is the unexplained delay by the appellant to open the door to his room taken together with inability of the police to get the door open even with the assistance of the hotel staff. The appellant gave no explanation for his conduct in this respect, especially the long delay on his part. Each of these circumstances when taken alone may be insufficient to prove *mens rea* possession. But that is not the test to be applied to circumstantial evidence. The true test is that laid down by Thomson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307 as follows:

> … where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[10] Taking into account the combined strength of the individual strands of evidence in this case, there can be no doubt whatsoever that the appellant was aware of his possession of the drug, that he knew the nature of drug he possessed and that he had the power of disposal over it. The overt acts of the appellant certainly establish these matters. In short, the appellant had *mens rea* possession. The learned judge was therefore entirely correct in invoking and applying the presumption under s 37(da) of the Act and in holding that the appellant had committed the offence of trafficking.

[11] There is an added feature in this case. Here, the learned judge was faced with a sharp conflict of oral evidence. He made findings of pure fact based on the evidence he accepted as true. It is also obvious from a reading of his judgment as a whole that he rejected the appellant's story that Man Chai was the real culprit. In such a case as

this we as an appellate court must defer to the views of the trial judge who had seen and heard the witnesses (see *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644).

[12] For the reasons already given, we found no merit in the appeal and dismissed it. The appellant's conviction and sentence were affirmed.

Appeal dismissed.

Reported by Sally Kee